

New SEC Probe of ICO Issuers and SAFT Structure

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The Wall Street Journal recently [reported](#) that the SEC has issued dozens of subpoenas and information requests in connection with sales and pre-sales of initial coin offerings. As we have [previously noted](#), the SEC Enforcement Division's Cyber Unit has been targeting ICOs in recent months, and the SEC has provided a [number](#) of [public statements raising concerns](#) regarding the ICO and cryptocurrency markets. It now appears that the SEC's regulatory efforts in this area may be ramping up.

According to the WSJ, the SEC's current scrutiny is focused in part on "simple agreements for future tokens," or SAFTs. [SAFTs](#) are one type of offering structure designed to insulate issuers of digital tokens from the risks of non-compliance with the federal securities laws. A typical SAFT structure will involve the sale of tokens for future delivery, with the sale made at a time when the tokens have either not yet been created or have not yet been issued due to the pre-functional development status of the network. Generally, issuers may treat the SAFT itself as a security, and take steps to structure the SAFT transaction so that it complies with an appropriate registration exemption or safe harbor under the Securities Act (including the filing of a Form D with the SEC in connection with the offering of the SAFT).

Proponents of the SAFT project have argued that the tokens sold pursuant to a SAFT are not securities under the federal securities laws, even if the SAFT itself is a security (although, since the initial SAFT [white paper](#) was published, the SEC has more specifically stated its [views](#) on when digital tokens will be considered securities). [Critics](#) of the SAFT project have argued that bifurcating the purchase of digital tokens through a SAFT may bring additional scrutiny of the transaction, and could, contrary to the purpose of the offering structure, make it more likely that a court would determine that the underlying token is a security. If the WSJ is correct and the SEC is targeting this transaction structure in particular, we may soon get additional clarity.

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